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REPEAL OF THE TULLOCH RULE: IS THE TIDE OF WETLAND REGULATION RECEDING?

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I. INTRODUCTION

Section 404 of the Clean Water Act ("CWA") authorizes the United States Army Corps of Engineers to issue permits for the "discharge of dredged or fill material into the navigable waters at specified disposal sites."[1] While the CWA provides exceptions to this general permitting requirement, these exceptions are not available for activities that bring the waters into a new, non-wetland use.[2] In the 1970s, the Corps promulgated regulations that generally tracked the statutory language.[3]

In 1986, the Corps modified the regulatory definition of "discharge of dredged material" to include "any addition of dredged material into the waters of the United States" with an express de minimis exclusion of any soil movement that occurs incidental to the "normal dredging" process.[4] In explaining the 1986 rulemaking, the Corps clearly stated that its purpose was to regulate the discharge of dredged material, not the dredging process.[5] In this regard, the Corps observed that "[d]redging operations cannot be performed without some fallback," and the regulation of this incidental fallback would constitute a regulation of the dredging process, a result that the Corps concluded was beyond the intent of Congress.[6] The 1986 regulations distinguished "sidecasting" from incidental fallback and regulated the

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[1]Clean Water Act, 33 U.S.C. § 1344(a) (1999).

[2]*See* 33 U.S.C. § 1344(f)(2). The subject of this paper is excavation and drainage of wetlands. These activities produce a new use for the land.

[3]*See* National Mining Ass'n. v. United States Army Corps of Eng'rs, 145 F.3d 1399, 1402 (D.C. Cir. 1998) (citing 42 Fed. Reg. 37145 (July 19, 1977)).

[4]*Id.* at 1401(citing 51 Fed. Reg. 41206, 41232 (1986)).

[5]*See id.* at 1402.

[6]*See* 51 Fed. Reg. 41206, 41210 (1986). (The Corps was responding to specific comments that the fallback and other soil movement incidental to normal dredging operations should be a regulated discharge. In explaining it final rulemaking decision, the Corps points out that the fallback is incidental to dredging operation and de minimis when compared to the overall quantities removed. The test of regulation suggested by the Corps was the dredger's intent. If the intent is to remove material from the water and the results support this intent, then the activity is a normal dredging operation and is not subject to regulation.

former because sidecasting "involves placing removed soil in a wetland . . . at some distance from the point of removal."[7]

In 1993, the Corps and the Environmental Protection Agency again modified the regulatory definition of "discharge of dredged material" under the CWA's § 404 Regulatory Program.[8] This modification was promulgated in response to the settlement of a lawsuit[9] in which the Corps and EPA agreed that "mechanized landclearing, ditching, channelization, and other excavation activities" would degrade the waters of the United States if they occurred within wetlands.[10] This modification became known as the Tulloch Rule.

The Tulloch Rule eliminated the de minimis exception and brought incidental fallback within the definition of "discharge of dredged material" even though the incidental fallback occurs, essentially, at the same spot as its removal. Under this formulation, the Tulloch Rule subjected virtually all dredging and excavation operations to federal regulation under § 404 of the CWA when the dredging changes the character or nature of the wetland.[11] While the Tulloch Rule eliminated the de minimis exception, the Rule left open a possible exclusion for any incidental deposition of dredged material that did not "have the effect of destroying or degrading an area of waters of the United States."[12] However, the dredge operator had the burden of proving that the operations would not have a negative effect, a threshold the Corp regarded as very low.[13] When the Tulloch Rule was adopted, the White House prophetically called upon the Congress to amend the CWA in accordance with the rule.[14] The rising tide of wetland regulation now covered all the land.

In 1998, the Court of Appeals for the District of Columbia Circuit held, in response to a facial challenge by industry, that the

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[7] *National Mining Ass'n.*, 145 F.3d at 1402 (citing 58 Fed. Reg. 45008, 45013 (1993), noting that sidecasting has always been regulated under § 404.)

[8] 58 Fed. Reg. 45008 (1993). Hereinafter in the text of this paper, references to the Corps are intended to include both agencies.

[9] *See* North Carolina Wildlife Fed'n v. Tulloch, Civil No. C90-CIV-5-BO (E.D.N.C. 1992).

[10] *National Mining Ass'n*, 145 F.3d at 1403.

[11] *See id.* at 1401.

[12] *Id.* at 1402-03 (citing 33 C.F.R. § 323.2(d)(3)(i)).

[13] *See id.* (citing 33 C.F.R. § 323.2(d)(3)(i); 56 Fed. Reg. 45020) (1993).

[14] *See id.* at 1410 (citing WHITE HOUSE OFFICE ON ENVIRONMENTAL POLICY, PROTECTING AMERICA'S WETLANDS: A FAIR, FLEXIBLE, AND EFFECTIVE APPROACH 23 (Aug. 24, 1993)).

Tulloch Rule exceeded the Corps' statutory authority.[15] The D.C. Circuit affirmed the district court decision and declared the Tulloch Rule unlawful.[16] To avoid a "flood of duplicative litigation,"[17] the court refused to apply the injunctive relief only for the complainant and its members and reinstated the district court's national injunction. The court urged the proponents of the Tulloch Rule to encourage Congress to amend the CWA as the White House had candidly urged.[18]

This paper examines the rising tide of legislative, administrative, and judicial regulation of wetlands that produced the Tulloch Rule, the effect of the Rule's regulatory high water mark on construction in wetland areas, and the impact of the Rule's demise.

II. LEGISLATIVE RULEMAKING AND JUDICIAL HISTORY

A. Statutory Authority for Regulation of Dredging, Excavation and Filling

Congress has given the Corps the authority to regulate dredging and filling activities that impact the waters of the United States primarily through two statutes: the Rivers and Harbors Act of 1899 ("RHA") and the Clean Water Act of 1972.[19] The RHA "regulates 'navigable waters of the United States' and prohibits 'work' (e.g., dredging and filling) or the placement of structures in such waters except in accordance with a permit issued by the U. S. Army Corps of Engineers."[20] In contrast, the CWA regulates the "discharge of 'any pollutant.'"[21] This is defined as "any addition of any pollutant to navigable waters from any point source."[22] The Corps derive their

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[15] *See National Mining Ass'n*, 145 F.3d at 1408.

[16] *See id.* at 1409-10.

[17] *Id.* at 1409.

[18] *See id.*

[19] *See id.* at 1401-02. (citing Rivers and Harbors Act, 33 U.S.C. § 403, as requiring a permit under § 10 for any dredging operations that occur within the waters of the United States. The Clean Water Act, 33 U.S.C. §1344, requires a permit for discharge of dredged or fill material into the waters of the United States).

[20] Mark A. Chertok, *Federal Regulation of Wetlands*, SD88 ALI-ABA 855, 858 (June 21, 1999) (citing the RHA).

[21] Jan Goldman-Carter, *Activities Regulated Under Section 404 of the Clean Water Act and the Farm Bill "Swampbuster" Provision*, SA83 ALI-ABA 87 (May 29, 1996).

[22] *Id.*

authority to regulate the discharge of dredged or fill material as a pollutant from § 404 of the act.[23]

1. Rivers and Harbors Act of 1899

The RHA requires a permit for activities, including construction, dredging, and filling, that may obstruct travel on navigable waters. These waters are defined as those waters that are, have been, or could be used for commercial transportation, or wetlands subject to tidal flows.[24] The RHA thus regulates all waters that have been or may have been used for interstate or international commerce, as well as waters affected by the "ebb and flow of the tide." In this regard, at least one federal district court has held that the RHA applies to the "entire width of a navigable waterway, to the line of mean high water."[25]

This definition of navigable waters allows the Corps to regulate all construction activities conducted within the coastal wetlands under the RHA § 10 permitting process. However, much of the nation's wetlands lie outside this jurisdiction, as most wetlands are isolated and not located in areas subject to the tidal flows. Therefore, the Corps' authority to regulate wetland activities under the RHA is limited only to activities that occur within the tidal areas.

2. Clean Water Act of 1972

Since the Corps already had an established role in regulating construction of navigable waters under the RHA, Congress delegated to the Corps the authority to administer the permit program for dredge and fill permits under § 404 of the CWA.[26] Since its enactment in 1972, the § 404 Permit Program has become the "federal government's primary mechanism to limit development in . . . wetlands" by requiring a permit for any "point source discharges of dredged or fill material into waters of the United States."[27]

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[23] *See* 33 U.S.C. § 1344 (1999).

[24] *See* Sharon M. Mattox, *Regulatory Obstacles to Development and Redevelopment: Wetlands and Other Essential Issues*, CA47 ALI-ABA 603, 607 (October 12, 1995).

[25] *Id.* (citing Bayou des Familles Dev. Corp. v. United States Army Corps of Eng'rs., 541 F. Supp. 1025, 1034 (E.D.La. 1982)).

[26] *See id.* at 607.

[27] *Id.* The Clean Water Act distinguishes between point and non-point sources of pollutants entering the nation's waters. Point sources are those pollutant discharges that occur at a discernible, specific location such as the end of a pipe. Non-point sources contribute the pollutant to the water body from an area, or activity whose affect can't be specifically located as

Discharge of dredged material is the addition of any material that had been excavated from a water of the United States, including runoff from a dredged material disposal site.[28] Discharge of fill material covers many activities associated with earth moving that places (discharges) the fill material into the waters of the United States.[29] Over the years, the definition of discharge of dredged and fill materials has expanded to include any activities that produce a regulated discharge into a jurisdictional wetland.[30] This expanded, regulatory definition of United States waters for purposes of the CWA has come to include "all waters whose degradation 'could affect' interstate commerce."[31] Compared to the reach of the RHA into wetlands, the regulatory jurisdiction under the CWA reaches virtually every poorly drained area, regardless of its size, ownership, or location.

B. Regulation of Wetlands Under § 404 of the Clean Water Act

1. Wetlands

Wetlands are defined within the regulations as areas saturated by surface or ground water at a frequency, and for a duration sufficient, to support vegetation that is typically adapted to life in saturated soil.[32] Even after substantial losses of wetlands over the last half-century, the estimated 105 million acres of wetlands that remain represent approximately five percent of the total area of the contiguous forty-eight states. With the inclusion of Alaska, wetlands comprise about twelve percent of the nation's land area.[33] However, approximately 221 million acres of wetlands once existed within the United States,[34] and, by the middle of the twentieth century, wetland losses averaged about 458,000 acres per year. During the 1970s, the environmental science community began to publicize the societal and ecological value of wetlands and the essential functions that wetlands fulfill. For example,

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to be administered with a permit program. For example, application of agricultural chemicals can affect the quality of the navigable waters, but their specific points of entry cannot be isolated.

[28] *See id.*

[29] *See id.*

[30] *See id.* at 609.

[31] Kelley A. Kinney and Andrea West Wortzel, *Environmental Law*, 32 U. RICH. L. REV. 1217, 1254-55 (1998).

[32] *See* 33 C.F.R. § 328.3(b).

[33] *See National Mining Ass'n*, 145 F.3d at 1402.

[34] *See* Chertok, *supra* note 20, at 857.

these groups have suggested that wetlands are important mechanisms because wetlands: (1) prevent or at least minimize flood events; (2) purify storm water runoff; (3) provide various wildlife benefits; and (4) provide critical food sources and habitats for numerous species, many of which are listed as endangered or threatened and which depend upon the wetland for their continued survival.[35] They argue that these wetland values even extend to non-tidal areas.

These claims about the importance of wetlands have driven the development of regulatory programs designed to reduce the loss of wetlands.[36] As a result, wetland losses declined to an average of approximately 290,000 acres per year during the 1970s, and, by 1977, the Corps' regulatory framework had expanded its jurisdictional reach to include any isolated, inland wetland whose degradation or destruction could affect interstate commerce.[37] Since "almost any spot of water 'could be' used by birds that cross state lines, virtually all isolated wetlands became regulable under this standard, no matter how small or isolated."[38] These efforts extended wetlands protection and further reduced the average annual wetland loss to about 117,000 acres between 1985 and 1995.[39]

At the same time that these regulatory efforts directed at wetland protection increased, the amount of non-wetland land suitable for development has declined. Since seventy-five percent of all wetlands are privately owned,[40] the wetlands have become a battleground between environmental interests seeking increased wetland protection and property owners wishing to develop their property. As such, the owners have challenged the authority of the regulatory agencies to diminish the owners' ability to develop the land and have further argued that the regulation is an uncompensated regulatory taking. These claims have increased the scrutiny of the regulatory programs by Congress and the court.[41]

In 1989, the Fourth Circuit held that jurisdictional claims over isolated wetlands violated the "notice and comment requirements of the

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[35] *See id.*
[36] *See id.*
[37] *See id.*
[38] Mattox, *supra* note 24, at 614.
[39] *See* Chertok, *supra* note 20, at 857.
[40] *See National Mining Ass'n*, 145 F.3d at 1402.
[41] *See id.*

Administrative Procedure Act."[42] However, the Corps has not recognized the impact of this decision outside the Fourth Circuit and continues to regulate isolated wetlands in all other circuits.[43] The Seventh Circuit held in 1993 that the use of these wetlands by migratory birds was a sufficient link to interstate commerce, allowing the court to defer to the Corps' inclusion of isolated wetlands within its jurisdiction. However, the court also held that the Corps must show that a particular isolated wetland is a suitable migratory bird habitat.[44] The Seventh Circuit revisited this general question in 1994 when it refused to extend the CWA's coverage to an artificial pond, warning that the "extent of federal jurisdiction over isolated waters remains an unsettled area of the law."[45] In 1997, the Fourth Circuit held that isolated wetlands were beyond the Corps' statutory authorization because isolated wetlands comprise "intrastate waters that have nothing to do with navigable or interstate waters."[46] However, just as the Corps ignored the Fourth Circuit's earlier *Tabbs Lake, Ltd. v. U.S.*[47] holding, the Corps has similarly elected to ignore the court's *United States v. Wilson*[48] holding in all other circuits.[49]

2. Legislative History of Clean Water Act

Senator Edmund Muskie was a chief sponsor of the CWA. During Senate debates about amendments to the act, he clearly expressed an intention that the CWA reach the nation's wetlands.[50]

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[42]Mattox, *supra* note 24, at 614. (citing Tabb Lakes, Ltd. v. United States, 715 F. Supp. 726, 728 (E.D. Va. 1989).

[43]*See id.*

[44]*See id.* at 614-15 (stating that after April showers not every temporary wet spot necessarily becomes subject to government control. Citing Hoffman Homes v. U.S. EPA, 999 F.2d 256 (7th Cir. 1993), the court warned that nearly all wetlands fall within the jurisdiction of the CWA since "one test for whether the wetland affects interstate commerce is whether migratory birds use the wetland ... On the other hand, it is not inconceivable that the ... Corps ... might completely overextend their authority.")

[45]*Id.* at 615 (citing Village of Oconomowoc Lake v. Dayton Hudson Corp., 24 F.3d 962 (7th Cir. 1994)).

[46]National Mining Ass'n v. United States Army Corps of Eng'rs, 145 F.3d 1399, 1412 n. 2.

[47]715 F.Supp. 726 (E.D. Va. 1989).

[48]133 F.3d 251 (4th Cir. 1997).

[49]*See* Kinney, *supra* note 31, at 40-41.

[50]*See* Bryan Moore, *National Mining Association v. United States Army Corps Of Engineers: The District Of Columbia Circuit Drains Wetlands Protection From The Clean Water Act*, 12 TUL. ENVTL. L. J. 235, 237. According to Senator Muskie, "The unregulated destruction of [wetlands] is a matter which needs to be corrected and which implementation of section 404

However, Senator Pete Domenici suggested Congress intended to restrict the reach of the § 404 program when he made it clear that Congress did not intend to regulate someone who is moving just a "little bit of earth." [51] Finally, Senator Ellender said that "[t]he disposal of dredged material does not involve the introduction of new pollutants; it merely moves the material from one location to another."[52] However, the Supreme Court chose to disregard these legislative comments and has instead concluded that Congress made a broad delegation of authority under the CWA to the Corps to protect the aquatic ecosystem.[53]

3. Expansion of § 404 Jurisdiction Between 1972 and 1993

When the Corps first applied the CWA, it regarded the jurisdiction over wetlands to be the same as defined by the RHA: navigable waters, and below mean high water (e.g. tidal wetlands). Litigation over the years, however, has expanded this jurisdiction to include all waters of the United States that may affect interstate commerce.[54] Accordingly, rulemaking in 1975 and 1977 expanded the jurisdiction to include wetlands that are adjacent to other regulated waters of the United States, as well as wetlands that are isolated, if their destruction or degradation could affect interstate or foreign commerce.[55]

4. The Redeposition Doctrine

The expansion of the regulatory reach into wetlands continued with the introduction of the Redeposition Doctrine in *Avoyelles Sportsmen's League, Inc. v. Marsh.*[56] In this case, the Fifth Circuit held that "redeposition associated with the landclearing activity constituted

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has attempted to achieve." *Id.*

[51] Bradford C. Mank, *American Mining Congress v. Army Corps of Engineers: Ignoring Chevron and the Clean Water Act's Broad Purposes*, 25 N. KY. L. REV. 51, 58 (1997).

[52] *Id.*

[53] *See* Moore, *supra* note 50, at 237 (citing U. S. v. Riverside Bayview Homes, 474 U.S. 121, at 132-33 (1985)).

[54] *See* Mattox, *supra* note 24, at 612.

[55] *See id.* (citing 40 Fed. Reg. 31321 (July 25, 1975); 42 Fed. Reg. 37122 (July 19, 1977); 33 C.F.R § 328.3(a) (1990) which presents the definition of "waters of the United States".)

[56] 715 F.2d 897 (5th Cir. 1983).

regulated discharges under section 404."[57] In explaining its decision, the court indicated that a redeposit could reasonably be considered an addition based on the purpose and legislative history of the CWA.[58] At the same time, the court did not reach the issue of whether "mere removal" or "de minimis disturbances" are in fact discharges and limited its holding to more significant redeposits.[59]

In 1985, the Eleventh Circuit applied the Redeposition Doctrine in *United States v. M.C.C. of Florida, Inc.*,[60] which involved bridge construction in the Florida Keys. The court held that the tugboat propellers were causing a discharge of dredged spoil by cutting into the bottom sediments and moving them with uprooted vegetation onto adjacent sea grass beds. The court considered this redeposition by analogy to sidecasting,[61] which is significant because it provided a stepping stone to the further expansion of the Corps' regulatory reach, eventually leading to the Tulloch Rule eight years later.

5. Corps Response to Redeposition Doctrine

Following the *Avoyelles* decision, the Corps issued Regulatory Guidance Letters ("RGL") to its personnel regarding the applicability of § 404 to excavation activities under the Redeposition Doctrine.[62] In RGL 84-04, the Corps made two telling statements about the statutory limits of their jurisdiction over dredging activities in wetlands and the de minimis discharge:

> Section 404 of the Clean Water Act authorizes [the Corps] to issue permits for the discharge of dredged or fill material into the waters of the United States. It does not authorize the Corps to regulate dredging in these waters.
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> . . .

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[57] *See id.* at 899.

[58] *See id.*

[59] *Id.*

[60] 772 F.2d 150 (11th Cir. 1985), *vacated on other grounds*, 481 U.S. 1034 (1987), *readopted in relev. part*, 848 F.2d 1133 (11th Cir. 1988).

[61] *See id.* at 1506. The use of the term "spoil" instead of "soil" in the preceding sentence is in recognition that the CWA regulates the discharge of dredged spoil, not soil.

[62] *See* Craig McKinney Douglas, *Partial Deregulation of Excavation and Dredging in Wetlands After National Mining v. U. S. Army Corps of Engineers: Reconsideration of the Regulatory Boundary*, 5 ENVTL. LAW. 469, 491 (Feb. 1999).

> 3. De minimis discharge occurring during normal dredging operation, such as the drippings from a dragline bucket, is not considered to be a [s]ection 404 discharge.[63]

These Regulatory Guidance Letters displayed a cautious approach to the jurisdictional reach issue under the *Avoyelles* Redeposition Doctrine. RGL 84-04 closely followed an earlier pronouncement by the Corps in RGL 84-01 in January of the same year, in which the Corps concluded that § 404 jurisdiction depended upon the extent of soil movement caused by the activity.[64] RGL 84-01 was based on the proposition that "[m]inimal movement of soil, in and of itself, incidental to removal or planting of vegetation is not subject to [s]ection 10 [of the RHA], nor is its deposit considered to be a [s]ection 404 discharge."[65] Two additional RGLs, RGL 84-05 and RGL 85-04, further described the *Avoyelles* Redeposition Doctrine and advised Corps personnel that applicability of § 404 is based on the "overall intent of the underlying activity rather than solely on the nature of that activity's associated discharge."[66]

In the midst of the emergence of the Redeposition Doctrine, and on the heels of the RGLs, the Corps engaged in significant rulemaking that culminated in 1986.[67] When the 1986 rule was adopted, the Corps maintained the two principles from RGL 84-04. De minimis or incidental soil movement occurring during normal dredging operations is not a discharge of dredged material as defined by the regulations. The Corps explained that fallback from dredging operations cannot be avoided, and if fallback from normal dredging operations was a discharge under § 404, then dredging operations would be regulable under § 404, a result Congress did not intend.[68]

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[63] *Id.* (citing U.S. Army Corps of Eng'rs, RGL 84-04: Application of Sec 404 to Dredging Projects (Mar. 23, 1984) [hereinafter RGL 84-04]).

[64] *See* U.S. Army Corps of Eng'rs, RGL 84-01: Regulatory Jurisdiction Over Vegetative Operations (Jan. 10, 1984) [hereinafter RGL 84-01].

[65] Douglas, *supra* note 62, at 494.

[66] *Id.*(citing U.S. Army Corps of Eng'rs, RGL 85-04: Avoyelles (Mar. 29, 1985) [hereinafter RGL 85-04].

[67] *See* 51 Fed. Reg. 41206.

[68] *See id.* at 41210.

6. Judicial Expansion of Redeposition Doctrine

By 1990, the Corps had concluded that all soil movement associated with mechanized landclearing activities within jurisdictional wetlands were redeposits subject to § 404 requirements. RGL 90-05 formalized this rule and made two important points. First, the Corps began to consider a comprehensive list of heavy equipment as point source discharges. Second, the Corps adopted the position that redeposits incidental to the clearing of a wetland are discharges of dredged material.[69]

Finally, the Ninth Circuit came very close to validating the Corps' ultimate Tulloch Rule position when it permitted the regulation of a placer mining operation in *Rybachek v. EPA.*[70] In placer mining, the miner excavates the bottom sediments from a waterway, and after extracting valuable minerals, redeposits the leftover material into the stream.[71] In *Rybachek*, the court held that the material is a pollutant when it is redeposited into the streambed from which it had been withdrawn because the material had been withdrawn for a distinct period of time, processed, and disposed.[72] This holding set the stage for the Supreme Court's decision in *Tulloch*.

III. *NORTH CAROLINA WILDLIFE FEDERATION V. TULLOCH*

A. Facts

Prior to the Tulloch Rule, regulatory agencies and the courts believed that dredging activity by itself was not within the reach of §404 unless the dredging operation caused more than a de minimis amount of fallback to occur.[73] Under this regulatory criterion, a

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[69] *See* Douglas, *supra* note 62, at 496-97. On this second point, the Corps apparently has moved away from its earlier position that land clearing was regulable only if the wetland was subsequently filled.

[70] 904 F.2d 1276 (9th Cir. 1990).

[71] *See id.* at 1282.

[72] *See* Douglas, *supra* note 62, at 498-99.

[73] *See* Craig N. Johnston, *1998 - The Year In Review*, 29 ENVTL. L. 69, 84-85 (Spring 1999). Environmental groups point out that while the perimeter ditching and subsequent drainage does not directly disturb the wetland area, the drainage of the wetland changes its characteristics in a material manner. The drained area can no longer support the vegetation and species that characterize wetlands. Therefore, these groups argued that the Corps should regulate this indirect drainage under the CWA.

developer could conceivably drain a wetland area by installing perimeter drainage ditches.[74] Water from the undisturbed wetland area could drain laterally into the ditches, destroying the CWA jurisdiction as long as the material removed from the ditches was not placed into a water of the United States.[75]

In North Carolina, a developer determined through engineering analysis that four foot deep drainage ditches, 200 feet apart, would effectively drain 700 acres of wetlands, located within an 1800-acre site by lowering the water table in the area.[76] This drainage would then eliminate the wetland hydrology and vegetation, and in effect remove the 700 acres from § 404 jurisdiction.[77] The developer presented this plan to the District Corps office and convinced the District that § 404 would not apply.[78] The Corp therefore drained the wetland area and placed the excavated soil upland or in sealed containers.[79] During the excavation process, only de minimis drippings from the excavation buckets were allowed to fall back into the excavation area.[80]

In 1990, the North Carolina Wildlife Federation filed a lawsuit in federal district court against this developer and the Corps to require enforcement of § 404 permitting requirements.[81] The plaintiffs and the Corps settled the suit on February 28, 1992 without the direct participation of the developer.[82] Under the terms of the settlement, the Corps agreed to change the definition of "discharge of dredged material" to specifically include incidental fallback[83] and "discharges associated with drainage, excavation, and channelization . . . ."[84]

While the Corps was preparing to initiate the promised rule-making pursuant to the settlement agreement, the Fifth Circuit further illustrated the confusion of the rule in *Save Our Community v. EPA*.[85] In that case, the Fifth Circuit held that drainage of a wetland is not

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[74]*See id.* at 85.
[75]*See id.*
[76]*See* Douglas, *supra* note 62 at 480.
[77]*See id.* at 499-500.
[78]*See id.* at 500.
[79]*See id.*
[80]*See id.* at 480, 499-500.
[81]*See id.* at 480.
[82]*See National Mining Ass'n,*, 145 F.3d at 1402.
[83]Sean A. Scoopmire, *D.C. District Court Invalidates the Tulloch Rule*, 6 S.C. ENVTL. L. J. 267-68 (1997).
[84]Goldman-Carter, *supra* note 21, at 91.
[85]971 F.2d 1155 (5th Cir. 1992).

regulated if it is accomplished without a discharge, even if the wetland is drained by pumping.[86]

B. Addition by Subtraction: The Tulloch Rule

In accordance with the settlement of *Tulloch*, the Corps proposed changes to the regulations on June 16, 1992. These changes closed the loophole exploited by the developer by explicitly bringing "mechanized landclearing, ditching, channelization and other excavation activities" under the § 404 permit requirements.[87] This expansion of jurisdiction was accomplished by first declaring that any redeposit, including incidental fallback, is a regulable discharge of a pollutant under § 404.[88] Secondly, the Corps removed the excavation of wetlands from the purview of normal dredging operations.[89]

As recently as the 1986 rulemaking, the Corps acknowledged that § 404 jurisdiction did not reach the actual dredging or excavation process.[90] These excavation activities, when they occur within the waters of the United States, are regulated under the RHA §10 permit program.[91] However, the RHA jurisdictional reach does not extend to a major body of the nation's wetlands that are regulated under the CWA § 404 non-tidal wetlands program.[92]

The Tulloch Rule provided a bridge between this regulatory gap. Prior to the rule, only the discharge of materials excavated from these non-tidal wetlands came within the reach of the § 404 permit program.[93] So long as the excavation could be performed with only de minimis fallback, the excavation activity was not regulated.[94] The Tulloch Rule expanded that jurisdiction to include all excavation of non-tidal wetlands that resulted in any incidental de minimis fallback.[95] Thus, the jurisdictional gap left by Congress was closed by a regulation that effectively grafted the RHA regulation of the removal of material

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[86] *See* Goldman-Carter, *supra* note 21, at 91-92.
[87] 51 Fed. Reg. at 45008.
[88] *See* Johnston, *supra* note 73, at 85.
[89] *See* Douglas, *supra* note 62, at 482.
[90] *See* 51 Fed. Reg. at 41,232.
[91] *See National Mining Ass'n*, 145 F.3d at 1403.
[92] *See id.*
[93] *See* Douglas, *supra* note 62, at 479.
[94] *See id.*
[95] *See id.* at 480.

from wetlands onto the § 404 program that governs the addition of material into jurisdictional waters.[96]

This exercise of definitional gymnastics required some effort to accomplish, expanding the definition of "discharge of dredged material" from 160 words after the 1986 rule-making to 764 words under the Tulloch Rule in 1992.[97] The change was accomplished by eliminating the de minimis exception for incidental soil movement and redefining discharge as "any addition . . . including any redeposit . . . incidental to any activity" including any realistic means of clearing, drainage or excavation.[98] This new definition was in conflict with previous Corps pronouncements and policy because, prior to Tulloch, the Corps maintained that Congress did not intend to reach the dredging and excavation processes with the § 404 program.[99] However, it is clear that the Tulloch Rule brought these removal activities within the § 404 discharge jurisdiction.[100]

C. Industry Challenges the Tulloch Rule

The Tulloch Rule became final when published on August 25, 1993, and industry groups immediately challenged the validity of the rule by filing a lawsuit.[101] In taking this action, industry advocates alleged that the Corps exceeded its statutory authority under § 404 "because Congress never intended for incidental fallback to be within the statute's jurisdiction."[102] In support of this allegation, industry argued that the statute unambiguously regulates the addition, or discharge, of a pollutant into the waters of the United States while the Tulloch Rule regulates the removal of material from the same waters.[103]

In defense of the Tulloch Rule, the Corps argued that the statute granted it the authority to regulate incidental fallback, something which had always been done under the Act.[104] The Tulloch Rule simply closed a loophole created by the Corps' de minimis exception, and the

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[96] *See id.* at 478, 480-83.

[97] *Id.* at 480-81.

[98] *Id.* at 481.

[99] *See* 51 Fed. Reg. at 41210.

[100] *See* Douglas, *supra* note 62, at 483.

[101] *See* Mattox, *supra* note 24, at 608. The lawsuit was filed on August 24, 1993, the day before the final rule was published in the Federal Register. *See id.*

[102] Mank, *supra* note 51, at 56.

[103] *See* Douglas, *supra* note 62, at 476.

[104] *See* Mank, *supra* note 51, at 56.

post Tulloch program better implemented the underlying statutory goals of protecting wetlands.[105] The Corps supported this basic position "on (1) the Corps' . . . construction of the Act; . . . (2) the legislative history; ... and (3) prior case law that validated" Tulloch through the Redeposition Doctrine.[106]

The first premise of the Corps' argument was that Congress did not expressly exclude or include incidental fallback within the intended scope of the § 404.[107] Therefore, the second tier of the *Chevron*[108] analysis required judicial deference to the Corps' interpretation of the statute.[109] Even if the Tulloch Rule was not the most likely interpretation of a broad statutory purpose, the Tulloch Rule was a permissible interpretation deserving the benefit of the doubt from the court.[110] The Corps pointed out that the "Supreme Court concluded that Congress" gave the Corps this broad authority because it was required to protect the "aquatic ecosystem."[111]

The argument also presupposed that the redeposition of materials removed from wetlands is a discharge of a pollutant under § 404.[112] The Redeposition Doctrine has been applied to materials excavated from the water and discharged into the same waters after extracting valuable minerals during placer mining.[113] The doctrine has also been used to justify regulation of a tugboat when the boat's propellers stirred the bottom and seabed materials were redeposited on an adjacent sea grass bed.[114] The Corps argued that *Tulloch's* expansion of the Redeposition Doctrine to incidental fallback that occurs during any landclearing operation was justified because these activities destroy or degrade the wetlands.[115]

The Federal District Court of the District of Columbia eventually held the Tulloch Rule invalid and issued a national

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[105]*See id.* at 56-57.

[106]Douglas, *supra* note 62, at 484-85.

[107]*See id.* at 485.

[108]Chevron, U.S.A., Inc., v. Natural Resources Defense Council, et al., 467 U.S. 837 (1984).

[109]*See* Mank, *supra* note 51, at 56.

[110]*See id.* at 67.

[111]Moore, *supra* note 50, at 237.

[112]*See id.* at 241.

[113]*See Rybachek,* 904 F.2d at 1282.

[114]*See MCC of Florida, Inc.*, 772 F.2d at 1506.

[115]*See* 58 Fed. Reg. 45008 at 45015-16.

injunction against its enforcement.[116] In applying the *Chevron* analysis, the court stopped at the first tier, concluding that the statute was clear and unambiguous in its intent to regulate an addition of pollutants.[117] Congress did not intend to regulate the removal of material from the water just because a small portion of it happens to fall back as the excavating device is moved through the water.[118] The court distinguished this incidental fallback from the various applications of the Redeposition Doctrine on grounds of the duration of the dislocation, the distance the material is moved from its place of origin, and the amount of material involved.[119] First, incidental fallback does not involve moving the material from one location to another.[120] Second, § 404 does not regulate the excavation process.[121] Finally, for at least eighteen years, the Corps' application of the statute excluded incidental fallback from § 404 jurisdiction.[122] Congress ratified this interpretation by not acting to modify or clarify the statute in the face of this regulatory approach.[123]

The Corps appealed to the D. C. Circuit and secured a stay of the district court's nationwide invalidation of *Tulloch*.[124] However, on June 19, 1998, a unanimous panel of the circuit affirmed the lower court's holding and invalidated the Tulloch Rule because it exceeded the Corps' statutory authority. In reaching this decision, the court made the following observations:

1. Dredged material of necessity must come from the water itself, and removal of material is not regulated under Section § 404 of the CWA.[125]

2 Excavation from water is regulated under the RHA § 10, but that jurisdiction does not reach non-tidal wetlands.[126]

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[116]*See* Kevin A. Gaynor, *Environmental Enforcement Developments - 1998*, SD28 A.L.I.-A.B.A. 35, 44 (1998).

[117]*See id.* at 41.

[118]*See* Johnston, *supra* note 73, at 85-86, 87-88.

[119]*See* Chertok, *supra* note 20, at 875.

[120]*See id.*

[121]*See id.*

[122]*See id.*

[123]*See id.* at 877.

[124]*See* Mank, *supra* note 51, at 69-70.

[125]*See* National Mining Ass'n, 145 F.3d at 1404.

[126]*See id.*

3. This regulatory gap cannot be eliminated "simply by declaring that incomplete removal" is an addition.[127]

4. The Tulloch Rule attempts to regulate "any deposit." While incidental fallback is a redeposit that exceeds the statutes reach, other forms of redeposit remain regulable under § 404.[128]

The court advised that, since the statute did not establish a bright line between regulable redeposits and the incidental fallback, the Corps would be given "considerable deference" to any future attempt to draw this line.[129] However, the Tulloch Rule did not qualify because the Corps sought to regulate a wide range of activities that do not "remotely add anything to the waters of the United States."[130]

The court characterized the Corps' argument that the district court misapplied the *Chevron* Doctrine as a "last-ditch ... defense of the Tulloch Rule."[131] The Corps' *Chevron* argument is that since Congress did not specifically address whether incidental fallback is a form of discharge, there is a presumption that Congress delegated the issue to the Corps.[132] Therefore, the Corps urges that the court must pass beyond the first tier analysis of *Chevron.* Once the court engages the second tier of *Chevron*, it must yield to the Corps' interpretation so long as that interpretation is permissible.[133] However, the court concluded that the Tulloch Rule "was an unreasonable construction of Section 404."[134] This language is not consistent with a first tier *Chevron* analysis that reaches the conclusion that the statute is unambiguous because it speaks to the reasonableness of the interpretation. Therefore, the court's analysis is confined to the reasonableness analysis of *Chevron's* second tier.[135] The Corps' argument continued that the Tulloch Rule is a permissible interpretation because discharge includes de minimis incidental fallback if it causes

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[127] *Id.* at 1405.
[128] *Id.*
[129] *Id.*
[130] *Id.*
[131] *Id.* at 1406.
[132] *See id.*
[133] *See* Mank, *supra* note 51, at 66.
[134] Moore, *supra* note 50, at 246.
[135] *See id.*

direct environmental impacts.[136] Therefore, under the second tier of *Chevron*, the court must defer to this interpretation, even if it is not the most reasonable one, or does not comport with the interpretation preferred by the court.[137] The Court of Appeals did not agree with these *Chevron* based arguments. The question is not whether the Corps has exercised its discretion lawfully, rather, "[t]he problem with the Tulloch Rule is that its faithful application would carry the [Corps] beyond its statutory mandate."[138] By attempting to regulate "any redeposit," the Corps ignored the statutory requirement of an addition.[139]

IV. REPEAL OF *TULLOCH*: WHAT NEXT?

Following the D. C. Circuit's decision, the Corps petitioned for a rehearing, and was denied.[140] The Corps did not appeal to the Supreme Court, and the Tulloch Rule is now dead.[141] However, the impact of this decision remains unclear because the ruling is only a partial deregulation that produces less predictability.

Under Tulloch, it was clear that a § 404 permit was required to excavate any material from any wetland. However, some commentators tend to discount the significance of the repeal of the Tulloch Rule. They point out that it is doubtful that the activities in North Carolina that gave rise to the Tulloch Rule would escape § 404 jurisdiction today.[142] First, the court limited the deregulation to incidental fallback.[143] Second, the government remains committed to preventing unregulated activity in wetlands.[144] Finally, the Corps has indicated its intention to remain aggressive toward landclearing and excavation of wetlands.[145]

Other commentators view this decision as having greater impact. They point out that the court could have accepted the efforts of the Corps on the basis of their superior scientific expertise and

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[136] *See* Mank, *supra* note 51, at 63.
[137] *See id.*
[138] *National Mining Ass'n* , 145 F.3d at 1408.
[139] *Id.*
[140] *See* Johnston, *supra* note 74, at 88.
[141] *See id.*
[142] *See* Douglas, *supra* note 62, at 501.
[143] *See id.*
[144] *See id.*
[145] *See id.*

advanced the broad objective of eliminating water pollution.[146] However, according to this perspective, the court elected to hide behind a narrow interpretation of the statute while calling on the Congress to close the § 404 loophole.[147] These critics of the decision warn that the court's refusal to defer to the Corps' interpretation results in significant costs to society because the regulatory agency is better positioned than the court to make these decisions.[148] The agency is closer to the polity, possesses greater scientific knowledge, and can be more flexible and uniform.[149]

In response to the invalidation of the Tulloch Rule, the Corps has deleted the word "any" as a modifier of "redeposit" from its definition of "discharge of dredged material," and specifically excludes "incidental fallback" from its coverage.[150] However, the Corps has reaffirmed its continued application of the redeposition doctrine to landclearing, sidecasting, and "subsequent redeposition after mineral segregation."[151]

Nonetheless, repeal of the Tulloch Rule reduces "regulatory ... authority over wetlands, particularly isolated wetlands."[152] It significantly reduces the amount of wetlands subject to regulation under the CWA and establishes a reversal of the recent rising tide of wetlands inclusion.[153] Many environmentalists are concerned that this decision may be the beginning of deregulation that could spread to other environmental protection statutes.[154] They also argue that today a developer can completely destroy a wetland even though such a destruction clearly violates the spirit of the CWA.[155]

V. CONCLUSION

Two important issues raised by the D. C. Circuit's repeal of the Tulloch Rule are whether the Corps exceeded its statutory authority, and whether the court properly applied the *Chevron* Doctrine in its

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[146] *See* Moore, *supra* note 50, at 248.
[147] *See id.*
[148] *See id.*
[149] *See* Mank, *supra* note 51, at 68.
[150] *See* Chertok, *supra* note 20, at 877.
[151] *Id.* at 877-78.
[152] Gaynor, *supra* note 117, at 45.
[153] *See* Kinney, *supra* note 31, at 1255.
[154] *See id.*
[155] *See* Scoopmire, *supra* note 84, at 270.

analysis of the case. Both questions should be answered in the affirmative.

One commentator, for example, concedes that the "court's ruling is in complete accordance with the statutory language of Section 404" while commending the Rule and encouraging Congress to act to close the loophole.[156] Actually, the White House called for congressional action on the day the Tulloch Rule became final.[157] In a statement released at the time of the Rule's announcement, the White House called on "Congress ... [to] amend the Clean Water Act to make it consistent with" the Tulloch Rule.[158] If the White House was convinced that the jurisdictional reach of the Tulloch Rule was within the authority provided by the CWA, there was no need to call for congressional action to reconcile the Act to the Rule.

With respect to the court's *Chevron* analysis, critics argue that because the statute is ambiguous, the court exceeds its authority by finding the Act unambiguous.[159] However, this argument fails because it's premise, e.g., that the statute is ambiguous, is the very question that the first tier of *Chevron* calls upon the court to determine.[160] In making this independent determination, the court may use traditional statutory construction, including the statutory language, the structure of the statute, and the legislative history.[161] This is precisely what the D. C. Circuit and the district court did in this case.

The tide of wetland regulatory jurisdiction has covered all wetlands over the past three decades. This rising tide began with the Redeposition Doctrine, which provided the first applications of the "addition by subtraction" concept.[162] However, as this doctrine was defined over the course of several years, the Corps maintained the public view that § 404 only regulated discharges of dredged material, not the process itself.[163] With the adoption of *Tulloch* in 1993, the

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[156] *Id.*

[157] *See id.*

[158] *National Mining Ass'n*, 145 F.3d at 1410 (citing WHITE HOUSE OFFICE ON ENVIRONMENTAL POLICY, *Protecting America's Wetlands: A Fair, Flexible, and Effective Approach* 23 (Aug. 24, 1993))

[159] *See* Mank, *supra* note 51, at 66.

[160] *See id.* at 62- 63.

[161] *See Chevron*, 467 U.S. at 843.

[162] Douglas, *supra* note 62, at 478.

[163] *See id.* at 479-80.

regulatory tide established its high water mark by using the incidental fallback as a pretext to regulate the dredging process.[164]

By revoking the Tulloch Rule, the court has rolled back this rising tide. Whether this roll back checks a single incident of regulatory overreaching or is the first step of a broader deregulatory trend remains to be seen. In either case, the rising tide of wetland regulation has reversed.

[164] *See* Johnston, *supra* note 73, at 87.